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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 471

DUNCAN MILLER,

Petitioner,

v.

STEWART L. UDALL,
Secretary of the Interior,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

DUNCAN MILLER
P.O. Box 728, Lake Shore Court
Boulder City, Nevada
Petitioner, Pro se

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner prays for a writ of certiorari to review the judgment of the U. S. Court of Appeals for the District of Columbia Circuit.

OPINION BELOW

The Court did not write an opinion.

JURISDICTION

The judgment of the Court of Appeals was entered on May 27, 1966. The jurisdiction of this Court is invoked under 28 U.S. Code, 1254(1)

HISTORY OF CASE, PRESENTING QUESTIONS

The Bureau of Land Management in administering the "Mineral Leasing Act" found petitioner to be the first qualified applicant for oil leases. Subsequently, the Interior Department by delegated solicitor authority *ex parte* overruled the Bureau's decision but without allowing petitioner the right to be heard and without notice to him. Petitioner filed suit in the District of Columbia District Court. Summary judgment was entered, again, without notice or hearing. On appeal, the Court of Appeals affirmed. Then, a motion to vacate the judgment filed in the District Court was denied fiat, on the second appeal, the court again affirmed.

The questions presented are:

1. Whether although the decision of the Court of Appeals may have held properly on the basis of the record, if that record was not one of "due process" and the appellate court was limited to its consideration, is petitioner entitled to relief?

   (a) Whether petitioner made a fatal mistake in going back to the district court with his motion to vacate the summary judgment instead of petitioning for certiorari after the first appellate court decision. As a result thereof is he now foreclosed from any relief?

2. Whether the summary judgment of the district court was invalid since it was entered without a date set for a hearing, also while there was no opposition and no opportunity to make same before judgment?

3. Whether the Bureau of Land Management is an agency distinguished from other bureaus of the Interior Department, by Presidential decree, confirmed by statute?

   (a) Whether its finding as to the first qualified applicant pursuant to said "Act" could be disturbed by the Solicitor's Department?

4. Whether a final administrative decision rendered without notice or opportunity to be heard, in violation of due process as held in decisions of this Court, may be set aside and the case remanded on this basis with the above questions being moot.

STATUTES

"Mineral Leasing Act of 1920." 41 Stat. 437, 30 U.S.C § 181 *et seq.* (1958 Ed.) most relevant part of Section 17, 30 U.S.C. § 226 (1958 Ed.) as quoted in Reasons, *infra*, from 85 S. Ct. 792 (1965).

STATEMENT OF THE CASE

In 1958 some four million acres of land on the North Slope of Alaska that were withdrawn from any preemption or appropriation under the public land laws (P.L.O. 82 dated January 22, 1943), pursuant to an order (P.L.O. 1621 dated April 18, 1958) were made available to oil and gas leasing preemption pursuant to the "Mineral Leasing Act of 1920," as amended. Subsequently, substantially all said land was applied for and leases issued except five tracts for which petitioner made application in October 1958 and for which he was found to be the first qualified applicant after adjudication by the Bureau of Land Management which held as follows:

> "It appears, then, that since the conflicting offerors, and their alternates in the drawing held for the lands in question are disqualified because of the collusive manner in which they filed in their lease offers, Duncan Miller, [Petitioner] *is* the *first qualified applicant* for the lands. *Accordingly, if leases are to be issued for the lands in question, they must be issued to the first qualified applicant.* Cf. C. T. Hegwer et al., 62 I.D. 135 (1955). When this decision becomes final the case records will be remanded to the Manager, through the Bureau's Office of the Operations Supervisor at Fairbanks, for the issuance of such leases to Mr. Miller, all else being regular." (Emphasis supplied.)

The four million acres was divided up into leasing tracts and it was provided that at the close of an initial simultaneous filing period a drawing would be held for all tracts for which there was more than one offer. However, it was further provided that any tracts for which the applications filed and drawn might be found to be invalid would thereafter be subject to the first qualified applicant filing over the counter and paying the full rental and fees; the same as the greater percentage of the tracts which have been all leased on this basis.

For the purposes of the drawing the lease offers were put into envelopes with *personal checks* for filing fees and the advance rental enclosed and the tract numbers were placed on the outside of the sealed envelopes. All unsuccessful applications were returned to the various applicants and no record kept of those that were drawn except No's 1, 2 and 3, as drawn.

Petitioner filed for five such tracts for which the No. 1, 2 and 3 applicants all had the same address, a post office box in Dallas, Texas.

Subsequently, petitioner protested and in an appeal to the Bureau of Land Management an investigation was undertaken and in its decision dated September 21, 1961 the Bureau held (as quoted above) that petitioner was entitled to said leases while finding the Dallas post office box address applicants were part of a colossal scheme where a number of people, 59 in all, each had filed 39 lease offers for various tracts, with certain schemers in control who would take the benefits of the leases for tracts drawn and who had agreed to deposit money to the bank accounts of these various applicants to cover the fees for tracts drawn for which their checks would be processed.

There were appeals made by the Dallas post office box parties from the Bureau of Land Management's decision to the Interior Department that resulted in a delegated decision, No. A-29251, which confirmed the invalidity of the fraudulent scheme of the Dallas post office box con-

tingent but ambiguously disturbed the Bureau's ruling that petitioner was entitled to the leases on the grounds that the drawings were invalid because only three applicants were drawn for each tract; therefore, the leases should be drawn over, but the decision did not disclose how this was possible or if it meant only the five tracts in question to be drawn over again. [1]

Action for judicial review was filed in the District Court for the District of Columbia. The respondent moved for summary judgment with a large volume of various documents and material. The District Court granted summary judgment without a hearing. Appeal was taken which resulted in the decision of the Court of Appeals. 349 F.2d 193. A motion was then filed in the District Court to set aside the judgment, in essence, on the ground there was no Constitutional Day in Court to decide the legality of the administrative decision, which also was rendered without a day in the administrative court. As a result each reviewing court only reviewed a record that did not conform to the Administrative Procedure Act, either administratively or judicially.[2]

One of the reasons urged for a day in Court was the economic consideration, petitioner said, truthfully, in this regard:

> "Plaintiff has invested large sums of money under the 'Mineral Leasing Act' in the Alaska land offices[2] for over a dozen years and has never received any income from leases issued to him. Further, in the Southern California District Land Office for over fifteen years plaintiff has likewise invested large sums and never received any income,

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[1] Moreover, currently only one applicant is drawn in such drawings.

[2] Also, certain strange coincidences with the national tragedy in Dallas were set forth.

gross or otherwise, whatsoever from these operations."

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[2] "Plaintiff travelled to Alaska on the representation that the Alaskan lands were to be opened on the historical 'first comer' basis to the *first qualified applicant*."

The District Court denied the motion fiat. On the second appeal the Appellate Court affirmed, on May 27, 1966.

REASONS FOR GRANTING THE WRIT

I.

The Bureau of Land Management Determined That Petitioner Was the First Qualified Applicant Pursuant to Section 17 of the Mineral Leasing Act.

The opinion of this Court at page 794, *Udall v. Tallman*, 85 S. Ct. 792 (1965) orients cogently the law applicable to the instant case:

> "*Section 17 of the Mineral Leasing Act provides, in relevant part, that 'the person first making application for the lease who is qualified to hold a lease* * * * shall be entitled to a lease of such lands without competitive bidding * * * 41 Stat. 443 (1920) as amended by 60 Stat. 951 (1946), 30 U.S.C. § 226 (1958 ed.). *The Bureau of Land Management* of the Department of the Interior *determined* that the Griffin lessees were the persons who had applied first, and issued to them leases on the tracts . . . 1958." (Emphasis supplied.)

The Bureau of Land Management determined that this petitioner, in 1958, "was the first person making application for the lease[s] who is qualified to hold a lease," but the leases were not issued pending adjudication of appeals instituted by the Dallas interests.

The Bureau of Land Management's determination as to such a first qualified applicant being conclusive is punc-

tuated insofar as petitioner's research of such land decisions [3] discloses no cases where such determinations have been abrogated except pursuant to the successful winning appeal of a conflicting applicant to the supervisory authority of the Department of Interior.

In short, administratively, the Bureau of Land Management functions as an agency with the power to perform such functions which could not properly be overruled in circumstances as are found herein.

The Bureau of Land Management became, by Presidential decree in 1946, Reorganization Plan No. 3, Sec. 403, effective July 16, 1946, 11 Fed. Reg. 7876, 60 Stat. 100(a), an *agency* to carry on the *functions* of the abolished General Land Office of the Interior Department, although under sub-paragraph (e) the Bureau is subject to direction and control of the Secretary of the Interior. The Bureau of Land Management in the administration of public lands, specifically pertinent here, the "Mineral Leasing Act," determines, as a part of that function, the first qualified applicant pursuant to said Sec. 17 of the "Act." Such determination is conclusive and leases are issued forthwith pursuant thereto. This determination may only properly be challenged by another entity contending an adverse right.

Something of a minor point is the foregoing if the petitioner's research, as stated, into such land decisions is erroneous, but if the respondent admits [4] that such research is substantially correct, then this minor point is advanced as a major one well worthy of this Court's review.

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[3] Dating back to the Bureau of Land Management's birth.

[4] Petitioner relies strongly on respondent's fairness in this regard.

II.

The Summary Judgment Was Invalid

The record clearly shows that summary judgment was improper for the respondent (defendant below), there was no hearing or date set for a hearing and the summary judgment was entered without the District Court having before it any opposition of petitioner (plaintiff below). The cases are legion that Appellate Courts are limited to review of the record, in the District Court, but since petitioner did not have a day in Court to make a record the Court of Appeals had before it a record that was not one of due process.

However, the foregoing points would seem to be moot, clearly the over-riding issue before this Court is the legality of the administrative decision.

III.

This Administrative Decision Was Illegal Because It Was Rendered Without a Hearing or Opportunity To Be Heard.

The most important provision of the "Administrative Procedure Act" is the right to be heard before a "decision."

In *Best v. Humble Placer*, 83 S. Ct. 379, this Court, in a public land case, reiterated that notice and a hearing were required for administrative "due process." In respondent's petition in that case it was stated:

> *"The Department of the Interior must comply with the requirements of the 'Administrative Procedure Act.'" United States v. Leary*, 63 I.D. 341. (Emphasis supplied.)

This was after discussing the administrative appeal procedures in the petition. That is, a normal administrative decision where there is an opportunity to be heard

pertaining to issues prior to the adjudication resulting in a decision. [5]

The petition further stated:

> "Any person adversely affected by the action of the department is entitled to judicial review."

However, judicial review contemplates something to review pursuant to the "Administrative Procedure Act." Thus, when a final decision is rendered without adjudication of any opposition advanced by the person adversely affected, there is nothing to review. Consequently such a decision could not be in compliance with the "Administrative Procedure Act" and, if such is the case, the decision is illegal.

The Complaint alleged in Par. 10(F) (FJA 7):

> "Particularly, *depriving* plaintiff of his established statutory rights in a *final administration decision* without notice or right of appeal would be *denial* of 'due process'." (Emphasis supplied.)

In *Pacific Molasses Co. v. FTC*, 356 F.2d 386 (1966), on page 387 it is stated:

> "One of petitioner's primary contentions is that they were *denied administrative due process* of law . . . [denial of hearing] If this procedural error did occur . . . then there *has been a denial of due process* and the order . . . cannot be allowed to stand." (Citations omitted.) (Emphasis supplied.)

Finally, the court held in *Pacific Molasses Co.*:

> "Because of the procedural errors committed by the Commission, its decision and order are reversed. . . ."

This Court *explicitly* covered the instant situation in *Morgan v. United States*, 58 S. Ct. at page 776:

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[5] It is believed that if respondent's land decisions were intensely researched, there would not be found one such final *ex parte* decision as the decision complained of — again petitioner relies strongly on respondent's fairness in admitting the truth of the foregoing.

> "Those who are brought into contest with the government in a quasi-judicial proceeding aimed at the control of their activities are entitled to be fairly advised of what the government proposes and *to be heard* upon the proposals *before it issues the final command.* No such reasonable opportunity was accorded the appellants." (Emphasis supplied.)

This petitioner received the "final administrative command" literally as "a bolt out of the (administrative) blue."

This Court struck the flint of the issue in this case in *Shields v. Utah Idaho Centr. R. Co.*, 59 S. Ct. where at page 163, the following most sterling language is found:

> "The Commission is to *'determine.'* The Commission must determine *'after hearing.'* The requirement of a 'hearing' has obvious reference 'to the tradition of judicial proceedings in which evidence is received and weighed by the trier of the facts.' The 'hearing' is 'the hearing of evidence and argument.'[6] Morgan v. United States, 298 U.S. 468, 480, 56 S. Ct. 906, 911, 80 L. Ed. 1288. And the manifest purpose in requiring a hearing is to comply with the requirements of due process upon which the parties affected by the determination of an administrative body are entitled to *insist.*" (Emphasis partly supplied.)

It would seem to follow, as the case stands, this "entitlement to insist" may be fulfilled only by the enforcement by this Court of the principles it has established.

It is routine procedure for this Court to grant certiorari and reverse where full briefing and argument are not warranted, e.g., *Parrot v. Tallahassee,* 381 U.S. 129 (1965); *Commissioner v. Cooper,* 381 U.S. 274 (1965); *Killgore v. Blackwell,* 381 U.S. 278 (1965); *Walker v. Georgia,* 381 U.S. 355 (1965); *McLeod v. Ohio,* 381 U.S. 356 (1965); *Federal Power Commission v. American Petroleum Corp.*, 381 U.S. 762 (1965).

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[6] This did not necessarily mean a hearing where oral argument was presented but simply an opportunity to present some argument and evidence before judgment.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

Duncan Miller
Petitioner, Pro se

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

No. 19,934 September Term 1965

Duncan Miller,
Appellant,
v.
Stewart L. Udall,
Secretary of the Interior,
Appellee.

Civil 1066-63

Filed May 27, 1966

Appeal from the United States District Court for the District of Columbia.

Before: Bazelon, Chief Judge, and Wright and McGowan, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was submitted on the brief of the parties.

On consideration whereof **it is ordered and adjudged** by this Court that the judgment of the District Court appealed from in this cause be, and it is hereby, affirmed.

Per Curiam

Dated: May 27, 1966

MEMORANDUM

IN OPPOSITION

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 471

DUNCAN MILLER, PETITIONER,

v.

STEWART L. UDALL, Secretary of the Interior

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

This case involves applications for oil and gas leases on public lands in Alaska under Section 17 of the Mineral Leasing Act of 1920, 41 Stat. 443, as amended, 30 U.S.C. 226. These lands had been opened for a period of simultaneous filings with a drawing held to determine priority. Thereafter, petitioner filed his applications and challenged the successful participants in the drawing. His protest was sustained, but the Secretary of the Interior ultimately

held that, rather than issue the leases to him as a "top-filer," the lands should be re-offered for simultaneous filings and a new drawing held—in which petitioner was free to participate (F.J.A. 66-76).[1]

Both petitioner and the winners at the first drawing sought judicial review of the administrative decision. In both cases summary judgment was entered in favor of the Secretary in the district court and affirmed by the court of appeals. *Miller* v. *Udall*, 349 F.2d 193 (C.A. D.C.); *Robertson* v. *Udall*, 349 F.2d 195 (C.A. D.C.). On remand, the petitioner filed a motion to set aside the judgment (S.J.A. 1-7). The motion was denied. A second appeal was taken, which affirmed without opinion the order of the district court. It is from this second judgment of the court of appeals that petitioner seeks review here.

While it is believed that petitioner was accorded ample opportunity to present all relevant evidence and legal arguments at both the administrative and judicial proceedings, any questions relating to due process prior to the first judgment of the court of appeals are not brought before this Court by the present petition. After the judgment of the court of appeals was entered on June 30, 1965, petitioner had 90 days in which to file a petition for a writ of certiorari covering any error which had been properly preserved until that time. 28 U.S.C. 2101(c). Having no claim within the purview of Rule 60(b) of

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[1] "F.J.A.——" refers to the Joint Appendix in No. 18732. "S.J.A.——" refers to the Joint Appendix in No. 19934.

the Rules of Civil Procedure, petitioner could not, instead, apply to the district court. Nor does the present petition revive questions which were open on the first appeal, decided more than a year ago. *Metropolitan Co.* v. *Kaw Valley District*, 223 U.S. 519, 523-524.

For the foregoing reasons, it is respectfully submitted that the petition for certiorari should be denied.

THURGOOD MARSHALL,
Solicitor General.

EDWIN L. WEISL, JR.,
Assistant Attorney General.

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A. DONALD MILEUR,
Attorneys.

SEPTEMBER 1966

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